

No. 3903

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United States <sup>6</sup>  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE UNITED STATES OF AMERICA,  
Plaintiff in Error,  
vs.  
D. C. AUSTIN,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of  
the Western District of Washington, Northern Division.

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**FILED**  
AUG 30 1922  
F. D. MONCKTON,  
CLERK,



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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Plaintiff in Error,  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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### **Names and Addresses of Counsel.**

THOMAS P. REVELLE, Esq., United States Attorney, Attorney for Plaintiff in Error,

310 Federal Building, Seattle, Washington.

JUDSON F. FALKNOR, Esq., Assistant United States Attorney, Attorney for Plaintiff in Error,

310 Federal Building, Seattle, Washington.

Messrs. GROSSCUP & MORROW, Attorneys for Defendant in Error,

3201 L. C. Smith Building, Seattle, Washington.

W. A. JOHNSON, Esq., Attorney for Defendant in Error,

3201 L. C. Smith Building, Seattle, Washington. [1\*]

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United States District Court, Western District of Washington, Northern Division.

May, 1921, Term.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

### **Complaint.**

Comes now the United States America, by Robert

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\*Page-number appearing at foot of page of original certified Transcript of Record.

C. Saunders, United States Attorney for the Western District of Washington, and Charlotte Kolmitz, Assistant United States Attorney for said district, and for cause of action against the above-named defendant D. C. Austin, respectfully shows the Court and alleges as follows:

I.

That "Cross Keys" is a steamship of American register plying in the trade between the Orient and the West Coast of the United States.

II.

That during the matters and times set forth in this complaint, D. C. Austin was, and is now, the master of the American steamship "Cross Keys."

III.

During the voyage complained of, the American steamship "Cross Keys" left the Orient, arriving at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, on the 19th day of May, 1921.

IV.

After arrival within the waters of the United States and within this district and division, the said defendant D. C. Austin, as master, as aforesaid, of the said American steamship "Cross Keys" filed with the Collector of Customs of the [2] United States, at the port of Seattle, Washington, certain manifests and store lists which were then and there claimed and represented by said master and purported to be true and correct manifests and store lists of all merchandise at that time on board said steamship. Thereafter, at



the port of Seattle, the customs officers of the United States found upon said steamship the following described merchandise of the following value, to wit:

21 Qts. Distilled Spirits

2 " Wine

1 Pint Liquor—Total value \$73.00

making a total valuation of said merchandise in the sum of Seventy-three Dollars (\$73.00); that said merchandise and no part thereof was shown, included or described in the said manifests or store lists, or in any of them.

#### V.

That said merchandise herein referred to and described in paragraph V hereof, was brought into the United States in the said steamship "Cross Keys" from a foreign place, to wit, from the Orient, and was not included or described in any manifest or store list hereinabove referred to and for which said merchandise there was no manifest or store list on board said steamship agreeing therewith.

#### VI.

A complaint having been made to the Collector of Customs of the United States at the Port of Seattle, Washington, by the Inspector discovering the merchandise hereinabove described, upon due notice the said Collector of Customs heretofore, on to wit, the 19th day of May, 1921, assessed against and imposed upon the said defendant D. C. Austin, master of the said American steamship "Cross Keys," a penalty equal to the value of such merchandise, that is to say, a penalty in the sum of Seventy-three Dollars (\$73.00). [3]

## VII.

That the said defendant has failed and refused and does fail and refuse to pay said sum of Seventy-three Dollars (\$73.00) imposed and assessed as a penalty, as aforesaid, although demand therefor has heretofore been made by the said Collector of Customs.

## VIII.

That by reason of the matters and facts herein set forth, the said defendant D. C. Austin is liable to the United States of America to a penalty in the sum of Seventy-three Dollars (\$73.00).

WHEREFORE plaintiff prays that it do have and recover of and from the said defendant the said sum of Seventy-Three Dollars (\$73.00), together with all of its statutory and other costs and expenses incurred in this action.

ROBERT C. SAUNDERS,  
United States Attorney.

CHARLOTTE KOLMITZ,  
Assistant United States Attorney.

United States of America,  
Western District of Washington,  
Northern Division,—ss.

Charlotte Kolmitz, being first duly sworn, on her oath deposes and says: That she is Assistant United States Attorney for the Western District of Washington; that she has read the foregoing complaint, knows the contents thereof, and that the same is true as she verily believes.

CHARLOTTE KOLMITZ.

Subscribed and sworn to before me this 26th day of July, 1921.

[Seal]

FRANK L. CROSBY, Jr.,  
Deputy Clerk U. S. District Court.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 27, 1921. F. M. Harshberger, Clerk. By Frank L. Crosby, Jr., Deputy Clerk. [4]



In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

**Demurrer to Complaint.**

Comes now the defendant by his attorneys, Grosscup & Morrow, and demurs to the plaintiff's complaint on the ground and for the reason that same does not state facts sufficient to constitute a cause of action.

GROSSCUP & MORROW,

Attorneys for Defendant,

3201-3203 L. C. Smith Building, Seattle, Washington.

Due service of the within and foregoing demurrer by the receipt of a true copy thereof, together with

true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 24th day of October, 1921.

THOS. P. REVELLE,  
By E. D. DUTTON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. S. E. Leitch, Deputy. [5]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

**Hearing on Demurrer to Complaint.**

Now on this 19th day of June, 1922, the above demurrer to complaint comes on for hearing and is sustained with exceptions asked and allowed.

Journal No. 10, page 225. [6]

United States District Court, Western District of  
Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

**Judgment.**

This matter having come on regularly for hearing on the 19th day of June, 1922, upon the demurrer of the defendant to the complaint of the plaintiff, and after argument of counsel for the respective parties, the Court being fully advised in the premises and having sustained said demurrer to said complaint;

And the plaintiff having elected to stand upon its complaint and refusing to plead further,—

Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that the plaintiff take nothing by reason of its alleged cause of action herein as against the defendant, and that this action as against the said defendant be, and the same is hereby, dismissed.

To all of which plaintiff excepts and its exceptions are allowed.

Done in open court this 8th day of July, 1922.

EDWARD E. CUSHMAN,

Judge.

O. K.

GROSSCUP & MORROW.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 8, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

Received a copy of the within judgment this 7th day of July, 1922.

GROSSCUP & MORROW,  
Attorneys for Defendant. [7]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
D. C. AUSTIN,  
Defendant.

**Petition for Writ of Error.**

Comes now the United States of America, plaintiff in the above-entitled cause, and feeling aggrieved by the final judgment herein entered on the 8th day of July, 1922, petitions this Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and according to the laws of the United States in that behalf made and provided, there to correct certain errors committed to the prejudice of the said plaintiff, which more in detail appear from the assignment of errors filed with this petition, and prays that a writ

of error issue out of said court of appeals, for the correction of the error so complained of, and that the transcript of the record and proceedings and papers in this cause, duly authenticated, may be sent to said court of appeals.

THOS. P. REVELLE,  
United States Attorney.  
JUDSON F. FALKNOR,  
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy Clerk. [8]

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United States District Court, Western District of  
Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

D. C. AUSTIN,  
Defendant.

**Assignment of Errors.**

Comes now the plaintiff, United States of America, by and through Thomas P. Revelle, United States District Attorney, and files the following assignment of errors upon which he will rely upon his appeal from the judgment made by this Honorable Court

on the 8th day of July, 1922, in the above-entitled cause.

## I.

That the United States District Court for the Western District of Washington, Northern Division, erred in sustaining the demurrer of the defendant to the complaint of the plaintiff herein.

## II.

That the said District Court erred in dismissing said action.

WHEREFORE, plaintiff prays that said judgment be reversed and that said District Court for the Western District of Washington be directed to reverse and set aside said judgment, and that plaintiff be granted a new trial.

THOS. P. REVELLE,

United States Attorney.

JUDSON F. FALKNOR,

Assistant United States Attorney.

Received a copy of the within assignment of error this 10th day of July, 1922.

GROSSCUP & MORROW,

Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy Clerk. [9]



United States District Court, Western District of  
Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

**Order Allowing Writ of Error.**

Comes the plaintiff, United States of America, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error on assignment of error intended to be urged, and praying also that a transcript of record and proceedings, upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings be had as may be proper in the premises.

Now, in consideration thereof, the Court does hereby allow the writ of error prayed for.

Dated this 11th day of July, 1922.

EDWARD E. CUSHMAN,  
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

United States District Court, Western District of  
Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

D. C. AUSTIN,  
Defendant.

**Admission of Service of Petition for Writ of Error,  
Order Allowing Writ of Error, and Praeipce  
for Transcript of Record.**

Due, timely and regular service, together with the receipt of copies thereof, of the plaintiff's petition for writ of error, order allowing writ of error, and praecipce for transcript of record, is hereby admitted this 10th day of July, 1922.

GROSSCUP & MORROW,  
Attorneys for Defendant.

Received a copy of the within this 10th day of  
July, 1922.

GROSSCUP & MORROW,  
Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of  
Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

**Praecipe for Transcript of Record.**

To the Clerk of the Above-Entitled Court:

You will please prepare a typewritten transcript of record in the above-entitled cause on writ of error, and file the same in the United States Circuit Court of Appeals for the Ninth Circuit, said record to comprise the following papers:

1. Complaint.
2. Demurrer.
3. Clerk's entry sustaining demurrer.
4. Judgment.
5. Petition for writ of error.
6. Assignment of errors.
7. Order allowing writ of error.
8. Admission of service.
9. This praecipe.

THOS. P. REVELLE,

United States Attorney.

JUDSON F. FALKNOR,

Assistant United States Attorney. [12]

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing, as provided under rule 105 of this Court.

THOS. P. REVELLE,  
United States Attorney,  
JUDSON F. FALKNOR,  
Assistant United States Attorney,  
Attorneys for Plaintiff.

We hereby acknowledge service of a copy of the foregoing praecipe, waive the right to request the insertion of any other matters than those incorporated in the foregoing praecipe, and stipulate that the proceedings, papers, orders and documents included in said praecipe constitute a full and sufficient record upon writ of error.

GROSSCUP & MORROW,  
Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

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In the United States District Court for the Western  
District of Washington, Northern Division.

No. 6186.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

D. C. AUSTIN,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 13, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals [14] for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making	
record, certificate or return, 25 folios at 15c.	\$3.75
Certificate of Clerk to Transcript of Record, 4	
folios at 15c .. .. .	.60
Seal to said Certificates .. .. .	.20
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Total . . . . .	\$4.55

I hereby certify that the above cost for preparing and certifying record, amounting to \$4.55, will be included in my quarterly account to the Government of fees and emoluments for the quarter ending September 30, 1922.

I further certify that I hereto attach and herewith transmit the original writ of error, original citation and original acceptance of service of writ of error and citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 25th day of July, 1922.

[Seal]

F. M. HARSHBERGER,

Clerk United States District Court, Western District of Washington. [15]

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In the United States Circuit Court of Appeals for the Ninth Circuit.

No. . . . .

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

D. C. AUSTIN,

Defendant in Error.

**Writ of Error.**

The United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court, before the Honorable Edward E. Cushman, between United States of America, the plaintiff in error, and D. C. Austin, the defendant in error, a manifest error hath happened to the prejudice and great damage of the United States of America, the plaintiff in error, as by its complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at said city of San Fran- [16] cisco, State of California, within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States of America, should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 11th day of July, 1922, and the year of the Independ-

ence of the United States one hundred and forty-fifth.

[Seal]

F. M. HARSHBERGER,

Clerk of the District Court of the United States for  
the Western District of Washington, Northern  
Division,

By S. E. LEITCH,

Deputy.

Acceptance of service of within writ of error  
acknowledged this 10th day of July, 1922.

GROSSCUP & MORROW,

Attorneys for Defendant in Error. [17]

[Endorsed]: No. ——. U. S. Circuit Court of  
Appeals, 9th Circuit, San Francisco. United States  
of America, Plaintiff in Error, vs. D. C. Austin,  
Defendant in Error. Writ of Error. Filed in the  
United States District Court, Western District of  
Washington, Northern Division. July 11, 1922. F.  
M. Harshberger, Clerk. By S. E. Leitch, Deputy.

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In the United States Circuit Court of Appeals for the  
Ninth Circuit.

No. . . . .

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

D. C. AUSTIN,

Defendant in Error.



**Citation on Writ of Error.**

The United States of America,—ss.

The President of the United States of America, to  
D. C. Austin, Defendant in Error, and to Gross-  
cup & Morrow, Attorneys for Defendant in  
Error, GREETING:

You are hereby cited and admonished to be and  
appear before the United States Circuit Court of Ap-  
peals for the Ninth Circuit at San Francisco, in the  
State of California, within thirty days from the date  
hereof, pursuant to a writ of error filed in the Clerk's  
office of the District Court of the United States for the  
Western District of Washington, Northern Division,  
wherein the United States of America is plaintiff in  
error, and D. C. Austin is defendant in error, to show  
cause, if any there be, why judgment in the said writ  
of error mentioned should not be corrected and speedy  
justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD E. CUSH-  
MAN, Judge of the District Court of the United  
States for the Western District of Washington,  
Northern Division, this 11th day of July, 1922.

[Seal]

EDWARD E. CUSHMAN,  
United States District Judge.

Attest:

F. M. HARSHBERGER,  
Clerk of United States District Court, Western  
District of Washington, Northern Division.

By S. E. LEITCH,  
Deputy Clerk. [18]

Acceptance of service of within citation on writ of error acknowledged this 11th day of July, 1922.

GROSSCUP & MORROW,

Attorneys for Defendant in Error.

[Endorsed]: No. —. U. S. Circuit Court of Appeals, 9th Circuit, San Francisco. United States of America, Plaintiff in Error, vs. D. C. Austin, Defendant in Error. Citation on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. July 11, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

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[Endorsed]: No. 3903. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. D. C. Austin, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.